MECHUNMA SDN BHD

v.

LAU TIONG IK CONSTRUCTION SDN BHD

HIGH COURT SABAH & SARAWAK, SIBU
CLEMENT SKINNER J
[CIVIL APPEAL NOS: 12-13-2001 & 12-14-2001]
31 MAY 2003

CIVIL PROCEDURE: *Appeal - Appeal to High Court - Whether ruling of sessions judge appealable - Whether ruling made in the course of a trial or hearing of a cause or matter - Whether ruling finally disposed of rights of parties - Courts of Judicature Act 1964, s. 3 - Whether right of appeal under O. 49 r. 6(1) Subordinate Courts Rules 1980 independent of s. 28 Courts of Judicature Act 1964*

These were two appeals brought by the appellant/defendant against the decision of the sessions judge dismissing its applications to strike out certain paragraphs in the respondent/plaintiff's statement of claim and reply. At the outset of the hearing of the appeals, the respondent/plaintiff raised a typical preliminary objection as to the competency of the appeals *vis-a-vis* s. 28 and 3 of the Courts of Judicature Act 1964 ('the CJA'). It was contended that the decision of the sessions judge was not appealable because it was not a 'decision' within the meaning of s. 3 of the CJA but merely 'rulings' that did not finally dispose of the rights of the parties. Conversely, the appellant/defendant argued that ss. 28 and 3 of the CJA must be read subject to O. 49 r. 6(1) of the Subordinate Courts Rules 1980 ('SCR'). It was submitted that O. 49 r. 6(1) of the SCR is, indeed, a written law that falls within the tether of the qualifying opening-words of s. 28 of the CJA, namely, "Subject to any other written law …".

Held:

[1a] Pursuant to ss. 3 and 28 of the CJA, a ruling is still appealable notwithstanding the fact that it did not finally dispose of the rights of the parties if, in the first place, it was not made in the course of a trial or hearing of any cause or matter. (*Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd* [2003] 2 CLJ 177 CA followed.) (p 567 b-f)

[1b] The two rulings made by the sessions judge in the present case were **not** made in the course of a trial because the trial of the respondent/plaintiff's main action had yet to commence. The said rulings were also **not** made in the course of a hearing of any cause or matter because they were made **after**, and not during, the hearing of the appellant/defendant's applications to strike out certain paragraphs in the respondent/plaintiff's pleadings. Consequently, the said rulings were appealable, **even though** they were rulings that did not finally dispose of the rights of the parties. (p 567 g)

Obiter:

[1] The right of appeal under O. 49 r. 6(1) of the SCR is **not** independent of s. 28 of the CJA. The competency of an appeal from the subordinate courts to the High Court is still subject to the filter within ss. 3 and 28 of the CJA. (*Sitrac Corporation Sdn Bhd v. Lim Siew Eng* [2002] 4 CLJ 463 HC.)

[Preliminary objection dismissed.]

Case(s) referred to:

Kee Yeh Maritime Co Ltd v. Coastal Shipping Sdn Bhd Bhd [2001] 5 CLJ 194 HC ***(refd)***

Shek Kwok Bun, Alexander John v. Wab Keluarga Realty Sdn Bhd [2002] 1 CLJ 480 HC ***(refd)***

Sitrac Corporation Sdn Bhd v. Lim Siew Eng [2002] 4 CLJ 463 HC ***(foll)***

Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd [2003] 2 CLJ 177 CA ***(foll)***

Tetuan J & S Holdings Sdn Bhd v. A Karim Hasan & Anor [2000] 4 CLJ 152 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 3, 27, 28
Court of Judicature (Amendment) Act 1998, s. 2
Subordinate Courts Rules 1980, O. 49 r. 6(1)

For the appellant/defendant - Gabriel Wong; M/s Detta Samen & Co
For the respondent/plaintiff - Paul Liong; M/s Liong & Co

Reported by Gan Peng Chiang

JUDGMENT

Clement Skinner J:

This ruling is delivered in respect of a preliminary objection raised by the respondent (who was the plaintiff in the court below) on the hearing of two appeals brought against the decision of the learned Sessions Court Judge given on 3 July 2001, dismissing two applications made by the appellant (who was the defendant in the court below).

The nature of the application made by the appellant/defendant in the first appeal ie, Civil Appeal No. 12-13-2001 was to strike out certain paragraphs in the reply filed by the respondent/plaintiff. The nature of the application made in the second appeal ie, Civil Appeal No. 12-14-2001 was to strike out certain paragraphs in the statement of claim filed by the respondent/plaintiff.

When the two applications above described came up for hearing before the learned Sessions Court Judge, she heard them and then adjourned the matters for delivery of her ruling on 3 July 2001, when she dismissed them. Hence these appeals.

At the outset of the hearing of these appeals, learned counsel for the respondent took a preliminary objection. He questioned the competency of these appeals in view of the definition of the word 'decision' in s. 3 of the Courts of Judicature Act 1964 ('the CJA'). This definition came into force on 1 August 1998 *vide* s. 2 of the Court of Judicature (Amendment) Act 1998. After the amendment the definition of 'decision' in s. 3 CJA now reads:

> 'Decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

It was the contention of the respondent that each ruling handed down by the learned Sessions Court Judge on 3 July 2001 was not a 'decision' within the meaning of the word in the current version of s. 3 CJA and was, therefore, not appealable as each ruling did not finally dispose of the rights of the parties, in that, the main suit between the parties in each appeal was still pending and their rights and obligations thereunder have still not been decided. In support of what he said, counsel for the respondent referred me to several High Court decisions in which it was held that an interlocutory order or ruling made by a lower court which did not finally dispose of the rights of the parties was not appealable because it was not a 'decision' as defined by s. 3 CJA. The cases referred to were *Kee Yeh Maritime Co. Ltd. v. Coastal Shipping Sdn Bhd*

[2001] 5 CLJ 194, *Tetuan J&S Holdings Sdn Bhd v. A Karim Hasan & Anor* [2000] 4 CLJ 152 and *Shek Kwok Bun, Alexander John v. Wab Keluarga Realty Sdn Bhd* [2002] 1 CLJ 480.

Counsel for the appellant submitted, on the other hand, that the appeals were competent because the appellate jurisdiction of the High Court is spelt out in ss. 27 and 28 CJA and s. 28 reads:

> (1) Subject to any other written law, no appeal shall lie to the High Court from a decision of a subordinate court in any civil cause or matter where the amount in dispute or the value of the subject matter is ten thousand ringgit or less except on a question of law.

Referring to the opening words of s. 28 CJA, namely, "Subject to any other written law", counsel for the appellant submitted that the right of appeal mentioned in s. 28 CJA must be read subject to what is stated in O. 49 r. 6(1) Subordinate Courts Rules 1980 ('the SCR') because, according to him, the SCR is that "other written law" which is referred to in s. 28 CJA. And when O. 49 r. 6(1) SCR is read it states:

> Notwithstanding anything contained in this Order, an appeal from any decision other than a decision made after trial by the Court shall lie to a Judge in Chambers of the High Court.

According to counsel for the appellant, since each ruling handed down by the learned Sessions Court Judge on 3 July 2001 was not a decision that was made after trial, it was appealable in accordance with the provisions of O. 49 r. 6(1) SCR. Counsel for the appellant accordingly urged me not to follow the decision in *Kee Yeh Maritime.*

To be fair to counsel for both the appellant and respondent, when this matter was argued before me the decision of the Court of Appeal in *Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd* in Civil Appeal No. Q-02-786-01 had not been handed down yet. It was delivered after I had reserved my ruling on the preliminary objection taken by the respondent and is now reported in [2003] 2 CLJ 177. In that case, in the course of hearing assessment of damages the deputy registrar ruled that the amended statement of claim, notes of proceedings, and judgment in Miri High Court Suit No. MR 26 of 1990 were inadmissible. The defendant being dissatisfied with the deputy registrar's ruling, appealed to the judge of the High Court who dismissed the appeal. On appeal to the Court of Appeal, counsel for both the appellant and respondent renewed their arguments on a preliminary issue which they had raised before the High Court judge, namely, whether the appeal from the ruling by the deputy

registrar in regard to the admissibility of documents was competent, and properly brought before the learned judge, in view of the definition of the word 'decision' in s. 3 CJA.

To decide the issue before it, the Court of Appeal subjected s. 3 CJA as amended to curial examination. The court held that in deciding whether a particular ruling was or was not a 'decision' within the meaning of the word in s. 3, nothing useful was to be gained by trying to interpret the meaning of a final order or an interlocutory order, "because one needs to merely look at the cold print of s. 3 CJA as amended, to see that any ruling made in the course of a trial or hearing of any cause and matter, which does not finally dispose the rights of the parties, does not constitute a decision for the purpose of s. 3 CJA, as amended".

The Court of Appeal then went on to offer guidance on the proper approach to be adopted when looking at the cold print of s. 3 CJA. It said, per Pajan Singh Gill JCA, that "Equal weight should be attached to the entire sentence of s. 3 CJA as amended, for what must be asked, is not whether a ruling does not dispose the final rights of the parties but also the question whether it was a ruling made in the course of a trial or hearing, of any cause or matter".

To give added weight to its observation that when interpreting the section, too much emphasis had been placed on the latter part of the sentence in s. 3 CJA, *viz-a-viz* "... does not finally dispose of the rights of the parties", so much so that scant regard had been paid to an equally important question, namely, as to at what juncture the said ruling was made, the Court of Appeal said, "If it was not a ruling made in the course of a trial or matter, regardless of the fact that it did not dispose of the rights of the parties, it may not be excluded by the definition of 'decision' as provided in s. 3 CJA as amended, and is therefore appealable".

Applying the ratio in *Tingan Lumber* to the facts of our appeals, I do not think that there is any dispute between the parties that the ruling of the learned Sessions Court Judge in these two appeals did not finally dispose of the rights of the parties as the ruling was on an issue other than the ultimate question between the parties. But the matter does not end there because "regardless of the fact that it did not dispose of the rights of the parties", "if it was not a ruling made in the course of a trial or matter", "it may not be excluded by the definition of 'decision' as provided in s. 3 CJA as amended, and is therefore appealable".

Now, each ruling in these two appeals was not made in the course of a trial because the trial of the respondent's actions have not commenced yet. Neither was each ruling made in the course of hearing of any cause or matter because the applications to strike out the particular pleadings were heard and completed and the ruling made after, not in the course of, the hearing of the applications. Since each ruling was not made in the course of the hearing of any cause or matter, it is in my view that they are not excluded by the definition of 'decision' in s. 3 CJA as amended, and therefore appealable. For the above reasons alone I would dismiss the preliminary objection.

Before concluding I feel I should express my view that I do not agree with the submission of counsel for the appellant that the rulings are appealable by virtue of the fact that the provisions of s. 28 CJA must be read subject to what is stated in O. 49 r. 6(1) SCR. This very issue was considered by his Lordship Abdul Aziz J, (as he then was) in *Sitrac Corporation Sdn Bhd v. Lim Siew Eng* [2002] 4 CLJ 463 at p. 465 where he said:

> Section 4(b) of the Subordinate Courts Rules Act 1955 empowers the Subordinate Courts Rules Committee to make rules for, *inter alia*, 'regulating and prescribing the procedure in proceedings by way of appeal from a Subordinate Court to the High Court'. The rules are in O. 49 of the SCR, where, in r. 1, 'decision' is defined as including 'judgment', 'order' and 'decree', like the original definition in the CJA, it is a wide definition. ... Since, however, the power to make rules conferred by s. 4(b) of the Subordinate Courts Rules Act 1955 is confined to making rules of procedure, and the rules in O. 49 of the SCR are therefore rules of procedure, the wide nature of the definition of decision in r. 1 cannot affect the operation of the definition of the word in CJA, which definition goes to the substantive matter of the scope of the High Court's appellate jurisdiction. Therefore, notwithstanding the broad definition of 'decision' in O. 49 r. 1 of the SCR, no appeal shall lie to the High Court from a subordinate court in respect of any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

I fully agree with the reasoning of the learned judge as to why the competency of an appeal arising from a Subordinate Court must still be decided by the definition of 'decision' in s. 3 CJA.

I dismiss the preliminary objection in each appeal with costs.